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No. 556

In the Supreme Court of the United States

OCTOBER TERM, 1960

TURPENTINE & ROSIN FACTORS, INC., APPELLANT

v.

UNITED STATES OF AMERICA

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA

MOTION OF THE UNITED STATES TO AFFIRM

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The United States moves, pursuant to paragraph 1(*e*) of Rule 16 of the Revised Rules of this Court, that the judgment of the district court be affirmed.

STATEMENT

This appeal grows out of a civil suit brought in 1951 by the United States under Section 1 of the Sherman Act against the Savannah Cotton & Naval Stores Exchange and two of its members (including appellant) and their subsidiaries (R. 2-12). Appellant was then, and is now, a dealer in naval stores (rosin and turpentine) produced from crude gum; it currently conducts extensive processing activities as well (R.

22-34). The complaint charged appellant and others with a conspiracy to fix, by means of wash sales between parent and subsidiary corporations, the naval stores prices posted on the defendant Exchange. The parties having consented to entry of a judgment without adjudication of the issues, a final consent decree was entered by the district court on October 18, 1951 (J.S. 7a-13a). The judgment, *inter alia*, required the appellant and other dealer defendants to provide such purchase and sale information as might be requested to an independent reporter designated by the United States Department of Agriculture (J.S. 10a-11a).

On May 4, 1960, appellant filed a petition to modify the 1951 consent decree on the ground that changed industry conditions have made the decree an instrument by which appellant's competitors secure an unfair competitive advantage (R. 26-31). The petition recited that the defendant Exchange has been dissolved and that all the defendants except appellant are no longer in existence; that appellant is the only member of the naval stores industry required to report sales and purchases; that, by reason of the reports, the details of appellant's business are available to competitors, whereas similar information as to competitors is unavailable to appellant; and that appellant thereby suffers disadvantage. Accordingly, the petition sought the removal of the reporting requirement from the consent decree.[1]

An evidentiary hearing was held on July 6, 1960 (R. 32-81), and briefs were filed by both parties. On

[1] Appellant's prayer for other relief was abandoned at the hearing on the petition (J.S. 3a).

July 21, 1960, the district court denied the petition on the ground that no evidence had been presented showing that the reporting provision resulted in such "grievous wrong" to petitioner as would justify removal of a requirement which is central to the effectiveness of the decree (J.S. 1a-6a). Petitioner appealed from this ruling on September 8, 1960.

ARGUMENT

This Court has set forth, *United States* v. *Swift & Company*, 286 U.S. 106, the narrow limits of judicial inquiry in passing upon petitions to modify provisions of antitrust consent decrees imposing obligations or restraints upon a party defendant. See, also, *United States* v. *Owens-Corning Fiberglas Corp.*, 178 F. Supp. 325 (N.D. Ohio); *United States* v. *International Boxing Club of New York, Inc.*, 178 F. Supp. 469 (S.D.N.Y.); *United States* v. *Swift & Company* (N.D. Ill.), decided December 12, 1960. And this Court has also made clear, *Chrysler Corp.* v. *United States*, 316 U.S. 556, 562, that a district court's determination granting or denying modification of a consent order will be reversed only upon a showing of "an abuse of [the] power to modify." There is plainly no showing of an abuse of the district court's discretion in the instant case.

1. Appellant argues that since it is the sole remaining defendant subject to the mandatory reporting requirements of the consent decree, it is subjected to unfair competitive disadvantage. As the district court pointed out, this contention was supported solely by the *ipse dixit* of appellant's president, and "the rec-

ord does not reveal any fact from which can be measured the impact or effect upon [appellant's] volume of sales, profits or ability to compete flowing from the asserted fact that petitioner is the only naval stores dealer required by a judgment to report its purchases and sales information" (J.S. 4a). Indeed, it appears that while appellant is the only party required to submit reports, virtually the entire naval stores industry reports on a voluntary basis the same information required of appellant under the decree (R. 76-77). This material is merged for publication purposes with the material submitted by appellant and, as shown by the typical reports introduced at the hearing below (R. 82-84), and, as admitted by appellant's president (R. 51-52), it is impossible to determine from the published reports the activity of any one processor or to identify the terms of individual transactions. At the same time, appellant's reports to the reporting service are confidential and not subject to public inspection (R. 79).

In short, the "hardship" of which appellant complains has not been demonstrated. The district court was thus clearly correct in concluding that "in view of the record that is before me under this petition, this Court would not be warranted in decreeing a modification so as to strike therefrom the reporting provision applicable to petitioner" (J.S. 6a).

2. Appellant also challenges the propriety of the reporting requirement as an original matter. But such an attack obviously cannot succeed; having agreed to the requirement in the first instance, appellant cannot now be heard to argue that it was improperly included

in the decree. See *Swift & Company* v. *United States*, 276 U.S. 311, 324. In any event, the contention is without merit. The Government's complaint made clear that the nub of the problem was the need of the gum farmers for adequate and accurate price information concerning rosin and turpentine, and that the alleged conspiracy had had the effect of "misleading farmers with respect to the price of rosin and turpentine by posting as official market prices arbitrary quotations resulting from fictitious and non-competitive sales" (Complaint, Section V(c) (R. 10)). The importance of the reporting requirements of the decree from the standpoint of establishing an impartial source of market quotations is reflected in the statement of former Assistant Attorney General Morison that "under the judgment, the Savannah Exchange and the corporate defendants are required to cooperate with an independent reporting service designated by the United States Department of Agriculture, so that farmer and consumer alike may have access to authentic price information" (see Department of Justice Press Release of October 18, 1951, Appendix, *infra*, pp. 7-9). The public need for this information did not cease with the termination of activities by the Exchange in the naval stores field. This is particularly the case in view of the fact that since 1951 the number of processing plants subject to appellant's ownership or control has more than doubled (R. 65), while the total number of processing plants in the industry has declined by nearly one-third (R. 74). The court was thus fully warranted in finding that "a modification [of the decree] that would relinquish the reporting requirements of

the judgment therefore would go to the very heart of the prohibitions that were consented to in the judgment and would, in effect, virtually nullify a great portion of it" (J.S. 6a).

CONCLUSION

The order of the district court denying the petition to modify the 1951 consent decree should be affirmed.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.

ROBERT A. BICKS,
Assistant Attorney General.

RICHARD A. SOLOMON,
JOEL E. HOFFMAN,
Attorneys.

DECEMBER, 1960.

APPENDIX

[For Immediate Release October 18, 1951]

DEPARTMENT OF JUSTICE

Attorney General J. Howard McGrath announced the entry today in the Federal District Court at Savannah, Georgia of an antitrust consent judgment terminating a civil action against the Savannah Cotton and Naval Stores Exchange, Inc., and the following seven corporations which deal in gum rosin and gum turpentine:

Columbia Naval Stores Company of Savannah, Georgia

Columbia Naval Stores Company of Fitzgerald, Georgia

Columbia Naval Stores Company of Hazelhurst, Georgia

Columbia Naval Stores Company of Jesup, Georgia

Columbia Naval Stores Company of Tifton, Georgia

Turpentine and Rosin Factors, Inc., Jacksonville, Florida

Pine Tree Products, Inc., Jacksonville, Florida

The judgment entered by the court requires the Savannah Exchange to terminate all of its activities relating to rosin and turpentine at the end of one year, unless the court at that time finds the continued operation of the Exchange to be in the public interest. The judgment also prohibits the Exchange from posting any price for rosin and turpentine other than actual sales

prices. This latter provision bars price quotations based on so-called "weighted averages" or on prices of other grades of rosin.

The complaint in this case, which was filed on October 11, 1950, pointed out that the prices paid to farmers for crude rosin and turpentine gum, and the prices charged to buyers of finished turpentine and rosin, were calculated on the basis of posted prices on the Savannah Exchange. The complaint charged that these posted prices were artificial and fictitious, because they were based on a very small volume of actual sales and represented in large part sales that took place between the affiliated defendant corporations. In order to insure that prices paid to farmers and prices charged to consumers should be based on a free competitive market, the judgment, among other things, enjoins the Savannah Exchange from permitting sellers of rosin and turpentine on the Exchange also to buy on the Exchange.

H. G. Morison, Assistant Attorney General in charge of the Antitrust Division, said: "In the view of the Department of Justice, the prices posted on the Savannah Exchange prior to the filing of this complaint were both fictitious and collusively arrived at. Such prices could not serve as a fair basis for determining either the prices to be paid to farmers for crude gum or to be paid by consumers for rosin and turpentine. We are satisfied that the judgment entered by the court today will do away with such fictitious price quotations in the turpentine and rosin industry. In addition, under the judgment, the Savannah Exchange and the corporate defendants are required to cooper-

ate with an independent reporting service designated by the United States Department of Agriculture, so that farmer and consumer alike may have access to authentic price information."

The judgment was prepared by Sigmund Timberg, Chief of the Judgment and Judgment Enforcement Section, and William D. Kilgore, Jr. of that Section. The case was prepared by Allen A. Dobey, Special Assistant to the Attorney General, and John H. D. Wigger, Trial Attorney.

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